

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EUKOR CAR CARRIERS INC.,)	No. C10-0408 BZ
)	
Plaintiff(s),)	
)	
v.)	
)	ORDER RE MOTION TO DETERMINE
CHEMOIL CORPORATION,)	SCOPE OF ARBITRATION
)	
Defendant(s).)	
)	
_____)	

Before the court is Plaintiff Eukor Car Carriers Inc.'s ("Eukor") motion to determine the scope of arbitration. Previously, Defendant Chemoil Corporation ("Chemoil") moved the court for an order staying this action pending arbitration. (Docket No. 8.) The primary issue in Chemoil's motion was whether the arbitration clause in the contract to which Chemoil and non-party Wilhelmsen are signatories is binding on Eukor. I found that it is binding on Eukor, and I granted Chemoil's motion, staying the case pending resolution of any arbitration. (Docket No. 27.) Eukor then filed a motion to lift the stay, "for the limited purpose of

1 allowing a full briefing on certain preliminary questions
2 of law that are outside the scope of arbitration" to be
3 determined by the court. (Docket No. 28.) I granted
4 Eukor's motion to the lift the stay to permit Eukor to file
5 a motion to establish that certain issues are outside the
6 scope of the anticipated arbitration.¹ (Docket No. 36.)
7 For the reasons set forth below, I find that the issues
8 identified by Eukor either fall within the scope of the
9 arbitration clause or are for the arbitrator to decide.

10 "[A]rbitration is a matter of contract and a party
11 cannot be required to submit to arbitration any dispute
12 which he has not agreed so to submit." AT&T Technologies,
13 Inc. v. Communications Workers of America, 475 U.S. 643,
14 648 (1986). Unless the parties clearly and unmistakably
15 provide otherwise, the question whether they agreed to
16 arbitrate the particular dispute is to be decided by the
17 court, not the arbitrator. First Options of Chicago, Inc.
18 v. Kaplan, 514 U.S. 938, 944 (1995). However, given the
19 law's permissive policies with respect to arbitration,
20 issues will be deemed arbitrable unless "it is clear that
21 the arbitration clause has not included" them.² Id. at

22
23 ¹ Notably, neither party briefed the narrow issue
24 before the court, which is whether the dispute over the
25 validity of the terms of the operative contract is one that
26 should be decided by the court or the arbitrator. Instead,
both parties presumed that this issue is for the court to
decide. For this reason, neither party's briefing was terribly
helpful. That said, the court has not found any cases on this
issue.

27 ² The Federal Arbitration Act reflects a "liberal
28 federal policy favoring arbitration agreements . . . [and] any
doubts concerning the scope of arbitrable issues should be

1 945.

2 Here, the operative contract contains an arbitration
 3 clause which states that "[a]ny controversy or claim
 4 between Buyer and Seller, or between Buyer and the fuel
 5 barge contractor, relating solely to the quality or
 6 quantity of marine fuels delivered or to be delivered ...
 7 shall be settled by arbitration" ³ (Docket No. 9,
 8 Exh. H.) The dispute between Eukor and Chemoil, evidenced
 9 by the complaint, clearly relates to the quality of bunker
 10 fuel provided by Chemoil and used by Eukor for the
 11 operation of a chartered vessel. (See Complaint, Docket
 12 No. 1 at ¶¶ 6-20.) The dispute therefore squarely falls
 13 within the scope of the arbitration clause, and must be
 14 submitted to arbitration. Granite Rock Co. v.
 15 International Broth. Of Teamsters, 130 S. Ct. 2847, 2856
 16 (2010) ("[A] court may order arbitration of a particular
 17 dispute only where the court is satisfied that the parties
 18 agreed to arbitrate *that dispute*.") (emphasis in original);
 19 Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126,
 20 1130 (9th Cir. 2000) (quoting Dean Witter Reynolds Inc. v.
 21 Byrd, 470 U.S. 213, 218 (1985) (the FAA "'leaves no place for
 22 the exercise of discretion by a district court, but instead
 23 mandates that district courts *shall* direct the parties to
 24 proceed to arbitration on issues as to which an arbitration
 25 _____
 26 resolved in favor of arbitration." Moses H. Cone Meml. Hosp. v.
Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

27 ³ As stated above, I previously ruled that Eukor is
 28 subject to this arbitration clause under the doctrine of
 equitable estoppel. (See Docket No. 27.)

1 agreement has been signed.'").

2 By its motion, Eukor challenges a number of other
3 provisions contained in the operative agreement (referred
4 to by the parties as the "Standard Terms") relating to the
5 limitation of liability, exclusive remedy, and exclusion
6 clauses. Eukor argues that given the limited scope of the
7 arbitration clause, it is clear that questions regarding
8 the validity of these remedy provisions falls outside the
9 scope of any arbitration. Eukor's argument is not well-
10 taken. The Supreme Court has recognized that a party
11 opposing arbitration may raise two types of validity
12 challenges: (1) a challenge specifically to the validity of
13 the agreement to arbitrate, and (2) a challenge to the
14 validity of the contract as a whole (*i.e.*, the substance of a
15 contract). Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct.
16 2772, 2778 (2010); see also Rosenthal v. Great Western Fin.
17 Securities Corp., 14 Cal. 4th 394, 419 (1996) (distinguishing
18 between "fraud in inducing consent specifically to the
19 arbitration agreement" and "claims that the contract as a
20 whole was obtained through fraud in the inducement").⁴ It is
21 well-established that only the first type of challenge is
22 relevant to the court's determination of arbitrability, and
23 thus a claim of invalidity as to the substance of the contract
24 does not prevent a court from enforcing a specific agreement
25 to arbitrate. Rent-A-Center, 130 S.Ct. at 2778; see also

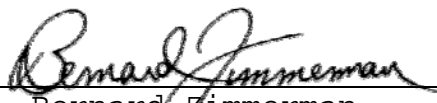
26
27 ⁴ In determining whether there is a valid agreement,
28 state law affirmative defenses, including unconscionability,
apply. See Ingle v. Circuit City Stores, Inc., 328 F.3d 1165,
1170 (9th Cir. 2003).

1 Hopkins & Carley, ALC v. Thomson Elite, 2011 U.S. Dist. LEXIS
2 38396 (N.D. Cal. Apr. 6, 2011).

3 Eukor does not challenge the validity of the arbitration
4 clause. Rather, it argues that eleven terms of the operative
5 agreement are unenforceable as a matter of law due to, among
6 other things, procedural and substantive unconscionablility.
7 But when a party contends that the substance of a contract is
8 unconscionable without challenging the validity of the
9 arbitration clause, the issue is for the arbitrator. Nagrapa
10 v. MailCoups, Inc., 469 F.3d 1257, 1263-64 (9th Cir. 2006);
11 Davis v. O'Melveny & Meyers, 485 F.3d 1066 (9th Cir. 2007);
12 see also Cotchett, Pitre, & McCarthy v. Universal Paragon
13 Corp., 187 Cal. 4th 1405 (2010). Eukor has cited no case
14 which holds that the court should decide, before sending a
15 case to arbitration, such matters as whether a limitation on
16 liability is enforceable, and the court has found none. Nor
17 will the court presume that the arbitrators will not correctly
18 decide these issues.

19 For these reasons, Eukor's motion is **DENIED**. The parties
20 are **ORDERED** to commence arbitration forthwith. Eukor shall
21 file a report on the status of arbitration on **March 1, 2012**.

22 Dated: November 17, 2011

23 
24 Bernard Zimmerman
United States Magistrate Judge

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26 ARBITRATION.V2.wpd